IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

QVC, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
HARVEY TAUMAN	:	NO. 98-1144

MEMORANDUM

Dalzell, J. April 2, 1998

QVC, Inc. has filed this action for a final injunction,[1] seeking enforcement of a restrictive covenant that would prevent defendant from appearing or using his name or likeness on the Home Shopping Network (hereinafter "HSN") to promote the wares of his new company, Greyson International, Inc. (hereinafter "Greyson"). After a trial today on the matter, this memorandum will constitute our findings of fact and conclusions of law under Fed. R. Civ. P. 52(a).[2]

I. Factual Background

The parties agree on the following facts. From 1970 until September 19, 1997, Tauman was the Chief Executive Officer and President of Hydron Technologies, Inc. (hereinafter

[1] QVC filed a motion for preliminary injunction with the complaint. At the hearing today, the parties agreed to convert this proceeding into a final hearing on the merits, pursuant to Fed. R. Civ. P. 65(a)(2).

[2] We have jurisdiction because, as amended by the parties' stipulation in open court today, the parties' citizenship is diverse and the amount in controversy exceeds $ 75,000. The parties do not dispute, nor do we disagree, that, pursuant to a contractual choice-of-law provision, Pennsylvania law applies.

"Hydron"), a Florida-based, publicly traded company. Hydron makes and sells cosmetic and personal care products.

On or about December 6, 1993, QVC and Hydron entered into a Licensing Agreement (hereinafter "Agreement") to sell Hydron products through QVC's nationally-distributed direct response television programs. Pursuant to that Agreement, Hydron designated Tauman to be the principal (though not only) spokesman for Hydron, and QVC invested significant resources creating several half-hour infomercials and an on-air persona for defendant that viewers eventually called "Hydron Harvey". Over the life of the Agreement, "Hydron Harvey" appeared on QVC 80-100 times in one hour segments, and appeared in half-hour infomercials 750 times. As compensation for Tauman's appearances on QVC, Hydron gave Tauman a $100,000 annual raise.

The collaboration was extremely successful. Through 1997, QVC sold about $70 million in Hydron products, or approximately 95% of Hydron's total sales. Regrettably, defendant's relationship with Hydron was not happy. It is undisputed that Hydron fired Tauman on September 19, 1997 by a five to four vote of Hydron's Board of Directors (Tauman's son cast the deciding vote against him). In any event, Tauman and his wife soon formed Greyson in order to market a new line of personal care products and cosmetics.[3] Tauman himself admits

[3] According to a press release Greyson distributed, the (continued...)

that "the venture was premised entirely on Tauman's promotion of Greyson products through direct response television on HSN," Def.'s Opp'n Prelim. Inj. at 3, a strategy also prominently set forth in Greyson's Private Placement Memorandum. See Pl.'s Supp. Prelim. Inj. at ex. E at 1.

Upon hearing of this new arrangement, QVC contacted both defendant and HSN, and eventually filed this action, in order to enforce the non-competition provision of its Agreement. The March 18, 1998 launch date of Greyson's products on HSN was aborted.

The First Amendment[4] to the Agreement contains the most recent iteration of the restrictive covenant that is at the heart of this case. It amended paragraph 6(a) of the Agreement to provide that

> [n]otwithstanding the foregoing, [Hydron], Tauman, and Fox acknowledge and agree that during the term of this Agreement and the ninety (90) day period following

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[3](...continued)
company plans to market "[t]he Aspirations product line, [which] uses a technologically advanced phospholipid delivery system designed to engulf the skin in moisture, leaving it feeling silky and creamy without any greasiness." Pl.'s Supp. Prelim. Inj. at ex. F.

[4] QVC, Hydron, and Tauman amended the Agreement twice, once on May 31, 1996 (hereinafter "First Amendment"), and again on June 11, 1997 (hereinafter "Second Amendment"). For reasons that will become evident later in this opinion, we note that Tauman signed on behalf of Hydron for all documents between QVC and Hydron, signing "Harvey Tauman President" on the original Agreement, "Harvey Tauman" as well as "Harvey Tauman, President" on the First Amendment, and "Harvey Tauman" on the Second Amendment.

> the expiration or termination of this Agreement, neither HTI, Tauman or Fox shall promote any products by any means of direct response television programming except as expressly set forth in this Agreement.

Pl.'s Supp. Prelim. Inj. at ex. B at 8-9.

II. Legal Analysis

Under Pennsylvania law, a post-employment restrictive covenant is valid and enforceable when it is:

> i. incident to an employment relation between the parties to the covenant;
>
> ii. the restrictions are reasonably necessary for the protection of the employer; and
>
> iii. the restrictions are reasonably limited in duration and geographic extent.

See Sidco Paper Co. v. Aaron, 465 Pa. 586, 591, 351 A.2d 250, 252 (1976) (citing cases). In addition, the majority of recent Pennsylvania Superior Court cases addressing the issue have also required adequate consideration for the restrictive covenant. See, e.g., Volunteer Fireman's Ins. Servs., Inc. v. CIGNA Prop. and Cas. Ins. Agency, 693 A.2d 1330, 1337 (Pa. Super. 1997); Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa. Super. 1995). Accordingly, we will also evaluate whether the restrictive covenant is supported by adequate consideration.

In general, post-employment restrictive covenants are subject to a more stringent test of reasonableness than covenants

ancillary to the sale of a business. See Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193 (Pa. Super. 1991). This heightened scrutiny stems from a historical reluctance on the part of Pennsylvania courts to enforce any contracts in restraint of trade, particularly where they restrain an individual from earning a living at his trade. Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 (1957).

A. Incident to an Employment Relation

The first prong of the test of restrictive covenants may also be restated -- and is more properly restated in this case -- as requiring that the restrictive covenant be "ancillary to the main purpose of a lawful transaction." Volunteer Fireman's, 693 A.2d at 1337. A restrictive covenant need not be found in an employment contract to be enforceable. Id.

Tauman has not challenged the License Agreement as a "lawful transaction," which may serve as a proper adjunct to the restrictive covenant, and so this prong is satisfied.

B. Necessary to Protect Employer's Legitimate Interest

This prong may also be restated to require that the covenant is "designed to protect a legitimate business interest . . . ." Thermo-Guard, 596 A.2d at 194. "Pennsylvania cases have recognized that . . . customer goodwill and specialized training and skills acquired from the employer are all legitimate interests protectable through a general restrictive covenant." Id. In the employment context we must

balance the business interest with "the important interest of the employee in being able to earn a living in his chosen profession." Id.

Based on the documents submitted and testimony adduced at the trial, we find that QVC invested significant resources in the creation and promotion of Hydron's products, and in particular made a substantial investment in the creation of an on-screen persona, well-known to QVC's customers as "Hydron Harvey."

Prior to his appearances on QVC, Tauman had no experience or established identity in direct response television. By investing up to $1 million in the creation of an infomercial in which Tauman appeared, and by facilitating many appearances by Tauman on its television broadcasts, QVC was almost wholly responsible for the marketing machine that transformed Tauman into a polished information-age barker. That investment has yielded a store of customer goodwill for QVC, in that QVC has exclusive rights to distribute the products that have been most closely associated with Tauman's persona. The very fact that Tauman was able immediately to negotiate a marketing agreement with HSN is powerful evidence of the enhanced value of his on-screen face. As Tauman himself recognizes, the market for skin care and cosmetic products -- in which he has spent his entire business life -- is extremely competitive, and his ability to conclude such an agreement without HSN even seeing Greyson's

product demonstrates that Tauman's established customer identity and capacity for salesmanship eclipses the quality of his products.

Furthermore, the effect of allowing a recent switch of Tauman from the QVC network to the HSN network is also likely to create substantial consumer confusion, further risking the impairment of QVC's ability to market Hydron's products.

Under the law -- and as the Agreement properly recognizes at paragraph two -- QVC may not be entitled to the fruits of its investment by indentured servitude of Tauman, but the network at a minimum is entitled to restrain its most significant competitor from immediately realizing the full benefits of Tauman's on-screen sales dynamism. We also recognize that QVC seeks enforcement of a fairly narrow restrictive covenant, one that does not wholly prevent Tauman from pursuing his new Greyson venture, or even from allowing him to market those Greyson products. QVC targets only the appearance of Tauman on HSN for the purpose of selling Greyson's products.

On the other hand, we also recognize the hardship that enforcement of the restrictive covenant would work to Tauman. In his judgment -- which, in light of QVC's extensive efforts to prohibit him from appearing on HSN, we fully credit -- Greyson can only be a successful venture if Tauman is personally allowed to appear on HSN in order to market Greyson's new products. Furthermore, as Tauman testified at the trial, he has worked in the cosmetics and personal care industry for more than forty

years, and has never pursued another vocation. He also testified, and QVC does not dispute, that he has invested $500,000 -- the balance of his life savings -- in Greyson, the initial success of which logically depends on his ability to market products by direct television solicitation, through his agreement with HSN. Although we find that QVC has demonstrated that enforcement of the restrictive covenant is necessary to protect a legitimate business interest, we will not fail to account for the disproportionately greater hardship Tauman will suffer as a result of that covenant.

C. Supported by Consideration

Recent cases have required that the restrictive covenant be supported by valid consideration. See, e.g., Bobston, 667 A.2d at 733. QVC argues that the consideration given by Tauman personally in the License Agreement is sufficient to cause the covenant to be enforceable even after Tauman's termination by Hydron. We agree. The Pennsylvania General Assembly has decided that "[a] written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." 33 Pa. C.S.A. § 6 (emphasis added). The License

Agreement, which Tauman signed personally,[5] provided just such language directly above the signature line: "Intending to be legally bound and in consideration of the promises and agreements made by QVC . . . in the foregoing Agreement . . . I, Harvey Tauman, for myself . . . hereby agree to the terms and conditions of the Agreement, as set forth above, and agree to be bound thereby." Pl.'s Supp. Prelim. Inj. at ex. A ("Licensing Agreement") at 12 (emphasis added). Alternatively, we also find that the $ 100,000 salary raise Hydron paid to Tauman "[i]n consideration of the services to be performed by Harvey Tauman pursuant to the terms of the License Agreement . . . between [Hydron] and QVC . . .", id. at ex. D, constitutes sufficient consideration to support the validity of the restrictive covenant.

D. Reasonably Limited in Duration and Geography

The parties do not disagree over the geographic aspect of the restrictive covenant, and therefore we do not address the issue. Whether the restrictive covenant is reasonably limited in duration, however, is a hotly disputed question. Tauman has attacked duration of the restrictive covenant in two ways: first, by arguing that the covenant in fact terminated and became

[5] We find unavailing defendant's contention that because he signed the document "Harvey Tauman President", consideration for the Agreement remained valid only so long as Hydron employed him. The evidence will not support such a sweeping inference, and is directly contrary to the plain language of the Agreement. See infra.

unenforceable against Tauman when Hydron fired him; and second, by arguing that the License Agreement can be renewed in perpetuity, and thus the restrictive covenant -- which depends for its duration on the life of the Agreement -- is invalid due to infinite duration.

1. Actual Limitation on Duration

In support of his first contention, i.e., that of actual termination of the covenant, Tauman offers three arguments, which we shall address seriatim. First, Tauman argues that he signed the original Agreement only as "President" of Hydron; thus, he argues, Hydron's firing of Tauman completely exonerated him of his obligations under the License Agreement. We disagree for two reasons. First, as stated above, the paragraph immediately preceding the signature line shows that Harvey Tauman, for himself, intended to be legally bound. Second, Tauman signed the First Amendment to the Agreement, which modified the restrictive covenant, as both "Harvey Tauman" and "Harvey Tauman President." Pl.'s Supp. Summ. J. at ex. B ("First Amendment to Licensing Agreement") at 13. Thus, even under Tauman's narrow and literalist construction of the import of his signature, Tauman evidenced an intent to be personally bound to the terms of the Agreement.

Tauman next argues that paragraph two of the Agreement terminates the restrictive covenant because it states that "Tauman shall continue to provide the services set forth herein and elsewhere in this Agreement, provided that Tauman . . . continue(s) to be retained or employed by [Hydron] or are otherwise compensated by QVC . . . ." Id. at ex. A at 2. That clause, however, does not apply to the restrictive covenant initially found elsewhere in the Agreement, and as later amended. This particular clause is by its plain language directed toward

absolving Tauman of his contractual obligation affirmatively to "provide . . . services" for QVC's benefit, such as his agreement in that same paragraph "to provide to QVC . . . with all necessary or appropriate consulting and advisory services in connection with the Promotion of the Products . . . ." Id. This distinction is not surprising in light of the fact that such an affirmative obligation much more closely resembles involuntary servitude. See, e.g., Government Guarantee Fund v. Hyatt Corp., 95 F.3d 291, 303 (3d Cir. 1996)(noting that "courts are loathe to order specific performance of personal services contracts" because "to do so would . . . run contrary to the Thirteenth Amendment's prohibition against involuntary servitude"). We also note that the amended restrictive covenant provides that it applies "[n]otwithstanding the foregoing" provisions of the Agreement. Pl.'s Supp. Prelim. Inj. at ex. B at 8. As a provision executed later-in-time than paragraph two, such a qualifier supersedes any hypothesized application of the termination provision in paragraph two.

Third, Tauman argues that the First Amendment, which amended the restrictive covenant, also modified paragraph three to provide that if Tauman is terminated from employment, he is "excused from his remaining obligations under the Agreement." Def.'s Opp'n Prelim Inj. at 8. Again, Tauman ignores the plain language of the Agreement. That provision explicitly states that "[i]n the event that Tauman is terminated from his employment with [Hydron], as a result of a material change in the control of

[Hydron], Tauman shall be excused from his obligations under this paragraph 3 . . . ." Pl.'s Supp. Prelim Inj. at ex. B at 5. Thus, the provision by its own terms does not affect any paragraph in the Agreement other than paragraph three. Moreover, if the parties intended so to limit the restrictive covenant under paragraph six, it is logical to presume that they would have inserted such precatory language when they contemporaneously amended that provision. The fact that they did not do so is, in our view, strong circumstantial evidence that they did not intend so to limit the duration of the restrictive covenant.[6]

2. Theoretical Limitation on Duration

As to Tauman's second, more theoretical argument, we find -- and QVC concedes -- that the covenant can be construed to be indefinite in its term. The life of the restrictive covenant depends upon the life of the Agreement, which, in turn, is found in section 1(b) of the Second Amendment. That section -- which amends paragraph 3(a) of the Agreement -- establishes for the Agreement an "initial term" ending on May 31, 1997, and a "First Renewal Term" ending on May 31, 1999, after which "th[e]

[6] On a related note, we reject Tauman's argument that the restrictive covenant does not cover the Greyson products he seeks to market on HSN. Although the restrictive covenant prohibits him from "promot[ing] any products", and "Products" as a defined term in the Agreement does not appear to embrace Greyson's product line, the use of "products" with a lower-case "p" confirms that that term was used in its conventional dictionary sense, rather than a defined sense. QVC preserved that legal distinction by selectively and consistently using the conventional and defined terms throughout the Agreement and amendments.

Agreement shall automatically continually renew for additional two . . . year terms unless" QVC fails to meet certain purchasing levels. Id. at ex. C at 3. Thus, the Agreement could march into perpetuity, carrying with it the restrictive covenant -- and Tauman's television career -- on its coattails for the rest of his life. Such a duration is clearly unreasonable. See Trilog Assoc., Inc. v. Famalaro, 455 Pa. 243, 314 A.2d 287, 294 (Pa. 1974) (rejecting a restrictive covenant with unlimited time and territory because it is "so far-reaching, that it becomes ludicrous").

III. Remedy

We conclude that, but for the flaw in time duration, the restrictive covenant is valid and enforceable. Moreover, we observe that it was grounded in sound business judgment, as most pointedly evidenced by the fact that Tauman's new putative employer, HSN, is QVC's most serious competitor. Under Pennsylvania law,

> [i]t is beyond question that the trial court ha[s] the power to grant only partial enforcement of the restrictive covenant. Pennsylvania courts have long held that where a restrictive covenant is found to be over broad and yet the employer is clearly entitled to some measure of protection from the acts of [an] employee, the court may grant such protection by reforming the restrictive covenant and enforcing it as reformed.

Thermo-Guard, 408 Pa. Super. at 194 n.9 (citing Pennsylvania Supreme Court cases). Accordingly, we will equitably reform the contract by deeming the Agreement -- as it applies to Tauman -- terminated as of today. Thus, Tauman remains bound by his obligations under the restrictive covenant until ninety days from the date of this Order, or July 1, 1998.

We think that such a limitation accurately reflects the initial intent of the parties, as equitably balanced by the relative interests and hardships of QVC and Tauman in this case. By the end of the restrictive covenant's effective period, Tauman will have been "off-the-air" for more than nine months, from September 19, 1997 to July 1, 1998. In light of the failure of QVC to adduce any evidence to suggest that Hydron sales fell off at all after Tauman's face disappeared from QVC's airwaves on September 19, 1997, we think that the period we enforce is more than adequate to vindicate QVC's legitimate business interests while preserving Tauman's right and ability effectively to pursue the only livelihood he knows.

An appropriate Final Injunction follows.